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Notes for the Minister of Justice's Appearance before The Special Senate Committee on the Subject Matter of Bill C-36 Evidence

Bill C-36 - *Anti-terrorism Act*

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CHECK AGAINST DELIVERY

Introduction

Honourable senators, it is a pleasure for me to be back here this afternoon with my officials. I know that this committee has worked very hard in terms of its pre-study of Bill C-36. I speak for myself and for the entire government when I say that I look forward to your advice and recommendations that will help inform the work of the House committee, as well as the work of the Government of Canada. I thank you for what I know have been very long hours in a short period of time.

The review and debate that has taken place in the House of Commons committee and before this committee has, it goes without saying, been thoughtful and insightful, raising many of the same issues the cabinet committee discussed in preparing this legislation.

Shortly after the horrific events of September 11, nations to which we regularly compare ourselves -- the United States, the United Kingdon , and many of our European allies -- took a second look at the legal framework and investigative tools available to them. We all recognize that the insidious nature of terrorism demanded an appropriate and measured but forceful response. Parliamentarians, academics, the media and individual Canadians called for stronger measures to ensure that Canada could deal effectively with the threat of terrorism.

Why do we need Bill C-36?

We are now a number of weeks past the events of September 11. However, we should not let this passage of time diminish our memory of the events of that date, nor the call for action.

Yes, we are part of a global community, however, this bill is not just about keeping up with our neighbours.

Yes, we take very seriously our Charter of Rights and Freedoms, but this bill is not about choosing the fight against terrorism over our guarantee to civil liberties.

Yes, we need to have a process to deal effectively with the threat of terrorism, but this bill is not

about power to any one person or organization.

This bill is about what we need to do to protect our most basic human right -- the right to live our lives in peace and security. If we do not protect this right, then the rights to freedom of expression, association and all the other rights guaranteed by the Charter are at risk.

I remind you of the words used by Professor Bayefsky when she appeared before this committee last week. She said:

"Terrorism is an extreme violation of human rights. That violation of human rights is our problem as Canadians. There is an apt saying that evil triumphs when good people do nothing. Our responsibility is to defend human rights, and to do so by taking the kinds of actions that are in this bill."

Bill C-36 includes much needed measures that will substantially increase this country's ability to fight the threat of terrorism. For those who suggest that this is comparable to the *War Measures Act,* their suggestion is simply wrong. The *War Measures Act* was invoked to deal with a specific threat to the security of Canada and was deemed necessary for a particular period of time. The fact is that we do not know when the threat of terrorism will disappear. We do not know how far reaching the support is for this particular enemy.

The new face of international terrorism is one that seeks to hold free and democratic nations hostage. So that this does not happen, it is our responsibility and our obligation to act in concert with other nations because, if we do not, if we choose to sit on the sidelines rather than change our laws and improve our investigative tools, we risk being part of the problem rather than part of the solution.

Currently we have laws that can be used and are being used against terrorism, including provisions in the *Criminal Code* and other statutes. These laws are not ineffective, but they are clearly not adequate. The commissioner of the RCMP has made observations on this in testimony before this committee. I quote from Commissioner Zaccardelli:

"Some people say that Canada already has a strong legislative framework and enforcement capacity to deal with terrorist threats. It has been our experience, based on our investigation into the tragic events of September 11, that is not true. Notwithstanding our efforts, it has become evident that there are some significant obstacles preventing law enforcement organizations such as the RCMP from detecting, deterring and destabilizing terrorist groups. Traditional investigative tools are inadequate in some cases."

Yes, we can, under our current laws, convict terrorists who actually engage in various acts of violence if we are able to apprehend them after their acts. However, we must do much more than that. We need investigative tools that will help us to gather information on terrorist groups and operatives before they engage in their attacks. This bill provides those tools. We need a broader power of arrest and conditions on release that will enhance our preventive capabilities and allow us to destabilize terrorist groups that are in the planning stages of an attack. This bill provides these powers.

New Offences

We need new *Criminal Code* offences that allow us to convict those who facilitate, participate in and direct terrorist activity. As we have already recognized with respect to organized crime, current Canadian law in the area of conspiracy is not sufficient to go after sophisticated criminal networks. These networks rely on cells, multi-layered leadership and the assistance of those not directly involved. Current law does not always allow us to pursue those who, without being involved directly, enable such crime. This is true for terrorist groups as well as for criminal organizations. Therefore, Bill C-36, as we intend Bill C-24 to do for organized crime, would provide

new offences targeting participation, leadership and similar activities. I would underline that these offences include a vital preventive element, because the terrorist enabling activities that they address are defined as offences regardless of whether the ultimate terrorist acts are actually carried out.

It has also been recognized that the enabling of terrorism includes financial assistance. Financial resources provide the necessary underpinning of the terrorist groups. That is why an entire category of the provisions in Bill C-36 take strong measures to address terrorist financing.

It is also worth mentioning that, in the area of terrorist financing and in other areas, notably with respect to terrorist bombings and the use of other lethal weapons, and with respect to the protection of UN and associated personnel, Canada has international obligations that it must fulfil. This bill does that as well.

All of these elements speak to national security and, as you know, protection of national security includes protection of vital national security information. Our current law includes a number of gaps through which there may be potential unwanted disclosure of such information. Such disclosure could jeopardize Canada and its allies. This bill seeks to close those gaps.

To sum up on this point, while we do have a legislative structure that can be used to fight terrorism, it is absolutely essential that this legislative structure be enhanced. If we are to effectively fight terrorism, we need tools specifically designed for this purpose. We cannot ask our law enforcement and security agencies to address the very real and very dangerous threat of terrorism without a full and effective legislative base. This has increasingly been recognized by other countries that have implemented specific anti-terrorism legislation. We must recognize this in Canada. The measures must be well designed and balanced, but we must have them in place.

This is an overview of why Bill C-36 is needed. I intend to discuss in more detail particular areas of the bill that have arisen repeatedly in the review and debate since the bill's introduction. Before I do so, however, I should like to make three points.

First, I have said before, and I wish to emphasize here, that we are open-minded about potential amendments to the bill. We realize that there have been concerns expressed about certain areas. We welcome examination of the bill from the perspective of the concerns that have been expressed.

Second, although I wish to review particular areas of the bill with this committee from the perspective of these concerns, I am not in a position to make definitive commitments to any particular amendments. I am certain that senators appreciate that this legislation is currently before the House of Commons and its standing committee on justice and human rights and that there will be a specific process with respect to amendments in that committee. That being said, we are extremely interested in the anticipated report from this committee and any specific recommendations for changes that are included in it.

Third, and this is a more substantive matter, my first two points being more of a process nature, I wish to address questions that have been raised about whether this is emergency legislation. Let me reiterate that I do not consider this to be emergency legislation. Rather, this legislation is a combination of our commitment to two UN conventions and our realization that we must do more to prevent acts of terrorism, acts on a scale that we are only just beginning to comprehend.

Bill C-36 is intended to deal with an ongoing and heightened threat of terrorism. This threat clearly existed prior to September 11, 2001, and we can expect that the threat will continue into the future. While we would like the threat to disappear in three years or five years, we must be prepared if it does not. What must remain is vigilance. Even as the current crisis diminishes in its intensity, as we hope and expect that it will, we must remain on our guard now and in the future.

Further, this is not a bill that changes Canadian law at large and across the board. Rather, it is a bill specifically directed at the threat of terrorism while making certain related changes with respect to national security and the protection of Canadians against acts of hatred. The measures in this bill are not so much extraordinary in themselves but are measures to respond to an extraordinary threat. In response to this threat, which I repeat is an ongoing threat, they are balanced and reasonable measures that include important and effective safeguards.

This is the perspective I have on this bill. With your help, we may be able to further refine some of these measures and their safeguards.

Review vs sunset clause

I should now like to turn briefly to discussion of some of the key elements of the legislation, which you have heard a great deal about here before this committee in pre-study. As you are aware, Bill C-36 currently includes a provision calling for a review of the provisions and operation of the proposed anti-terrorism act by a committee of the Senate, the House of Commons or both houses. In our view, there will be a distinct benefit from reviewing the bill in light of its actual operation. Further, we may wish to adjust provisions of the bill in light of changed circumstances after three years. This is the purpose of the review clause.

There have been numerous suggestions, however, for a sunset clause in the bill, a clause under which some or all of the provisions of the bill would expire after a predetermined time, unless re-enacted by Parliament. We have, in the government, listened with interest to these suggestions. There are a number of considerations that must be taken into account in reviewing a possible sunset clause.

First, as I have indicated, the threat of terrorism may not disappear -- probably will not disappear -- after three or five years. We must consider whether the tools Parliament enacts in Bill C-36 will be appropriate tools well into the future. It may be that we can refine and adjust these tools after some years of experience. Nevertheless, we expect the basic need for the bill to remain.

Second, there has been some suggestion that a sunset clause would help to bolster the constitutionality of the provision of the bill. On this argument let me be absolutely firm and clear. I consider the provisions of this bill to be constitutional; otherwise, I would not have presented them to you and the House of Commons committee. I do not think that it is necessary to add a sunset clause to make them more constitutional. If, after careful consideration, it is felt that there is a need for a sunset clause, then that need would have to be based on some other ground than constitutionality.

Finally, with respect to the sunset clause, there has been some misunderstanding with its existence in the legislation of other countries, notably the United Kingdom and the United States. I wish to clarify that neither country has a broad-base sunset clause in its legislation. In the United Kingdom Terrorism Act 2000, no sunset clause applies with respect to the vast majority of the provisions of the act. A sunset clause does apply with respect to certain special provisions dealing with the situation in Northern Ireland. When the Terrorism Act 2000 was enacted, there was hope that the troubles in that area would finally be resolved within an immediately foreseeable time-frame. We see, then, a specific justification for a time limitation clause for those special provisions. Let me just acknowledge with some satisfaction that in recent days it seems that some of these expectations for peace in Northern Ireland may be realized.

It is important to recognize, however, that the entire remainder of the United Kingdom legislation dealing with the general and ongoing effort against terrorism in that country is not time limited. These provisions of the UK legislation are, as Professor Paul Wilkinson indicated to this committee, comparable to Bill C-36. I also observe that Professor Wilkinson expressed the view that Bill C-36 should not be time limited.

In the United States, meanwhile, the core anti-terrorism legislation that was enacted in 1996 also does not have a sunset clause. As proved to be the case, terrorism in the United States was not something that was about to disappear three years after the enactment of that law. It is true that the United States' legislation, which enhances their existing anti-terrorism law in certain areas, does include a sunset clause. The President of the United States signed this new legislation this past Friday. It is important to note, however, that the sunset clause only applies to one of the titles of the new act dealing with special powers of electronic surveillance. It does not apply a sunset clause to any of the other provisions of the new legislation.

Further, there was considerable controversy with respect to even this limited sunset clause with many in the United States doubting whether it was appropriate.

Definition

As honourable senators are well aware, the definition of "terrorist activity" is absolutely central to Bill C-36, a point I made when I first appeared here. Many of the other provisions of the bill relate directly to this definition. In view of this, we did spend a considerable amount of time crafting this provision. Nevertheless, improvements may be possible, and it is entirely appropriate that this definition has been the focus of considerable scrutiny.

An aspect of the definition that has drawn attention are the words that exclude "lawful advocacy, protest, dissent or stoppage of work" from its ambit. Some have questioned whether the definition inappropriately fails to recognize that even unlawful activities of this type normally do not amount to terrorism. This is an important question and one that I know that honourable senators are seized with.

I wish to emphasize that it has never been our intent to extend the scope of definition to activities of this type, that clearly do not belong within it. This aspect of the definition merits attention and we would be most interested in the recommendations of this Senate committee on that issue.

At this point, I should like to emphasize that we have been sensitive to the perception that the definition and the bill as a whole could be used to target ethnic and cultural communities. We have reached out to these communities to explain that this is not the case. Our discussions with them will continue.

I note an idea that has been raised on the subject matter of discrimination and hatred. Clause 12 of the bill would add a new provision to the Criminal Code that would make it a special offence to commit mischief against a place of religious worship, when the mischief is motivated by bias, prejudice or hate. It has been noted that when the offence is of this nature, it is insufficient to give it the name "mischief" and that some other term would be more appropriate. This, too, is an interesting suggestion.

Investigative Measures

One of the provisions of Bill C-36 that has attracted considerable attention is that of providing for investigative hearings. We spoke at some length about this when I was before you a week ago. Questions have been raised about the provisions allowing the state to compel testimony under this proposed new clause. It has been suggested that this is contrary to fundamental traditions and rights under Canadian law.

It is true that these provisions would add a new obligation under Canadian law. It is important to emphasize, however, that the obligation is for the pressing and substantial purpose of fighting terrorism. We are not proposing that the power be enacted at large in the *Criminal Code*. It is also important to note that the power is not without precedent and includes important safeguards.

With regard to precedents for such power, as I mentioned last time I was here, there is an existing

procedure under the *Mutual Legal Assistance and Criminal Matters Act* that already allows us to do this in Canada in order to gather evidence for other countries. Our review of the records would indicate this power has been used fairly frequently for other countries. Evidence gathering of this nature is frequently used in Canada and, perhaps more importantly, it has withstood constitutional scrutiny by the courts.

Also, it is important to emphasize that while there are rights against self-incrimination under the Charter, there is no general privilege against giving testimony in Canada. Persons are regularly required to testify at trials other than trials for an offence charged against them and can be arrested if they refuse to testify.

In addition, a close analogy to the special power we are suggesting for Canadian law, with respect to terrorism, exists in the general criminal law of the United States with respect to investigative grand jury proceedings.

Safeguards

Numerous safeguards would apply to the new provisions on investigative hearings under Bill C-36. First, it should be remembered that the person obliged to testify in these hearings would not be doing so in the context of a trial for an offence. Further, the person obliged to testify is extended protection against self-incrimination, subsequent use and derivative use. Also, while the individual is compelled to testify, laws relating to the non-disclosure of information or privilege continue to apply. The right to counsel also continues to apply in this setting. Further, the prior consent of the Attorney General is required before an application for compulsory testing may be brought. The standard on which an order is obtained is based upon the Charter consistent reasonable grounds believed standard. There must also be reasonable grounds to believe that the person sought to be compelled has direct and material information that relates to the offence or that reveals the whereabouts of the person who the peace officer suspects may commit that offence. Reasonable attempts must have been made to obtain the information from the person.

The legislation also provides the judge with the authority to order terms and conditions to protect the interests of the witness or third parties. Therefore, while we have extended Canadian law in Bill C-36 to provide for investigative hearings, we have done so for a limited, important purpose and have ensured that the new power is appropriately circumscribed.

Preventive Arrest

Another measure of the bill that is receiving close scrutiny, and rightly so, is that with respect to preventive arrest. Under this provision, if a police officer believes on reasonable grounds that a serious terrorist offence is about to take place, and suspects, again on reasonable grounds, that the arrest of a particular person would prevent it, that person can be arrested to be brought before a judge. The object of bringing the person before the court is for the court to consider whether restrictions should be imposed on the person's movements and associations.

Here again it is important to emphasize that the power is not without precedent and is subject to numerous safeguards. Canadian law currently provides for a power to arrest a person on the reasonable belief that he or she is about to commit an indictable offence, and numerous provisions of Canadian law already deal with conditions placed on release of persons.

The preventive arrest provisions of Bill C-36 build on these provisions, but only for the special purpose of our fight against terrorism.

With regard to safeguards, except for emergency circumstances, this substantial power can only be invoked with the consent of the Attorney General. This section contemplates a judicial hearing within 24 hours. Additional safeguards include judicial supervision of the recognizance process, the requirement for reasonable grounds for belief that terrorist activity will be carried out, the

requirement that an arrest without warrant can only be made where it is necessary to prevent the commission of a terrorist activity and the ability of the person to seek to vary a recognizance.

Canada Evidence Act

I should like to turn briefly to concern about certain proposed changes under the *Canada Evidence Act* and the related changes under the *Access to Information Act* and the *Privacy Act*. The changes that have led to concerns are those that deal with the so-called Attorney General prohibition certificates that would prevent the court from disclosing information in court proceedings. Under Bill C-36, section 38 of the *Canada Evidence Act* would be amended to provide the Attorney General of Canada with the power to file a prohibition certificate in legal proceedings to prevent the disclosure of information injurious to international relations, national defence or security. The purpose of these certificates is to provide, where necessary, a method to absolutely prevent the disclosure of certain highly sensitive information. This guaranteed protection from disclosure is necessary, above all, with respect to security and intelligence information shared with Canada by other countries.

In developing this amendment to the *Canada Evidence Act*, it became clear that we also had to provide a similar guarantee against disclosure in other pieces of federal legislation. In particular, if Bill C-36 had been limited to the *Canada Evidence Act* exclusively, individuals might still be able to use the back door to get this information by making requests under the *Access to Information Act* or the *Privacy Act*. Therefore, it was necessary to equally exclude access to this information through these routes.

However, comments from several quarters, and particularly from the Information and Privacy Commissioners, suggest that in safeguarding this highly sensitive information we may have gone too far. There is some concern that, without a check on this exercise, the power to issue a certificate could be used beyond what is necessary to protect international relations, national defence or security. With that in mind, we acknowledge the need to consider a review mechanism. We have made no decisions on such a mechanism and very much look forward to your input on this question.

As you complete your review of Bill C-36, I urge you to keep in mind something that our colleague Irwin Cotler has expressed. He said that the struggle against terrorism is part of the larger global struggle for the promotion and protection of human rights and human dignity. Terrorism must be seen as the ultimate assault, not only on human rights but also on democracies themselves and on the peace and security of humankind.

Accordingly, our anti-terrorism measures are a fundamental component of our nation's human rights agenda. With that, honourable senators, I look forward to your questions and comments.

Thank you.

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